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# Subsequent agreements and subsequent practice in relation to the interpretation of treaties

## Text of the draft conclusions adopted by the Drafting Committee on second reading

## Part One
## Introduction

**Conclusion 1**
***Scope***

The present draft conclusions concern the role of subsequent agreements and subsequent practice in the interpretation of treaties.

## Part Two
## Basic rules and definitions

**Conclusion 2**
***General rule and means of treaty interpretation***

1. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation. These rules also apply as customary international law.

2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as provided in article 31, paragraph 1.

3. Article 31, paragraph 3, provides, *inter alia*, that there shall be taken into account, together with the context, (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; and (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

4. Recourse may be had to other subsequent practice in the application of the treaty as a supplementary means of interpretation under article 32.

5. The interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in articles 31 and 32.

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**Conclusion 3**
***Subsequent agreements and subsequent practice as authentic means of interpretation***

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

**Conclusion 4**
***Definition of subsequent agreement and subsequent practice***

1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.

2. A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

3. A subsequent practice as a supplementary means of interpretation under article 32 consists of conduct by one or more parties in the application of the treaty, after its conclusion.

**Conclusion 5**
***Conduct as subsequent practice***

1. Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions.

2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

## Part Three
## General aspects

**Conclusion 6**
***Identification of subsequent agreements and subsequent practice***

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

3. The identification of subsequent practice under article 32 requires, in particular, a determination whether conduct by one or more parties is in the application of the treaty.

**Conclusion 7**
***Possible effects of subsequent agreements and subsequent practice in interpretation***

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

2. Subsequent practice under article 32 may also contribute to the clarification of the meaning of a treaty.

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law.

**Conclusion 8**
***Interpretation of treaty terms as capable of evolving over time***

Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

**Conclusion 9**
***Weight of subsequent agreements and subsequent practice as a means of interpretation***

1. The weight of a subsequent agreement or subsequent practice as a means of interpretation under article 31, paragraph 3, depends, *inter alia*, on its clarity and specificity.

2. In addition, the weight of subsequent practice under article 31, paragraph 3 (b), depends, *inter alia*, on whether and how it is repeated.

3. The weight of subsequent practice as a supplementary means of interpretation under article 32 may depend on the criteria referred to in paragraphs 1 and 2.

**Conclusion 10**
***Agreement of the parties regarding the interpretation of a treaty***

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

# Part Four
# Specific aspects

**Conclusion 11**
***Decisions adopted within the framework of a Conference of States Parties***

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing or implementing the treaty, except where they act as members of an organ of an international organization.

2. The legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty and any applicable rules of procedure. Depending on the circumstances, such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32. Decisions adopted within the framework of a Conference of States Parties often provide a non-exclusive range of practical options for implementing the treaty.

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

**Conclusion 12**

***Constituent instruments of international organizations***

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and subsequent practice under article 32 may be, means of interpretation for such treaties.

2. Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

3. Practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31 and 32.

4. Paragraphs 1 to 3 apply to the interpretation of any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization.

**Conclusion 13**

***Pronouncements of expert treaty bodies***

1. For the purposes of these draft conclusions, an expert treaty body is a body consisting of experts serving in their personal capacity, which is established under a treaty and is not an organ of an international organization.

2. The relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty.

3. A pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32. Silence by a party shall not be presumed to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body.

4. This draft conclusion is without prejudice to the contribution that pronouncements of expert treaty bodies make to the interpretation of the treaties under their mandates.

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# Identification of Customary International Law

## Text of the draft conclusions as adopted by the Drafting Committee on second reading

## Identification of customary international law

## Part One
## Introduction

**Conclusion 1**
**Scope**

The present draft conclusions concern the way in which the existence and content of rules of customary international law are to be determined.

## Part Two
## Basic approach

**Conclusion 2**
**Two constituent elements**

To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).

**Conclusion 3**
**Assessment of evidence for the two constituent elements**

1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element.

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# Part Three
# A general practice

**Conclusion 4**
**Requirement of practice**

1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.

**Conclusion 5**
**Conduct of the State as State practice**

State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.

**Conclusion 6**
**Forms of practice**

1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice.

**Conclusion 7**
**Assessing a State's practice**

1. Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.

2. Where the practice of a particular State varies, the weight to be given to that practice may, depending on the circumstances, be reduced.

**Conclusion 8**
**The practice must be general**

1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.

2. Provided that the practice is general, no particular duration is required.

# Part Four
# Accepted as law (*opinio juris*)

**Conclusion 9**
**Requirement of acceptance as law (*opinio juris*)**

1. The requirement, as a constituent element of customary international law, that the general practice be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

2. A general practice that is accepted as law (*opinio juris*) is to be distinguished from mere usage or habit.

**Conclusion 10**
**Forms of evidence of acceptance as law (*opinio juris*)**

1. Evidence of acceptance as law (*opinio juris*) may take a wide range of forms.

2. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.

3. Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

## Part Five
## Significance of certain materials for the identification of customary international law

**Conclusion 11**
**Treaties**

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(a) codified a rule of customary international law existing at the time when the treaty was concluded;

(b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or

(c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

**Conclusion 12**
**Resolutions of international organizations and intergovernmental conferences**

1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.

2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development.

3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*).

**Conclusion 13**
**Decisions of courts and tribunals**

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.

2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules.

**Conclusion 14**
**Teachings**

Teachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of rules of customary international law.

## Part Six
## Persistent objector

**Conclusion 15**
**Persistent objector**

1. Where a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection.

2. The objection must be clearly expressed, made known to other States, and maintained persistently.

3. The present conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).

## Part Seven
## Particular customary international law

**Conclusion 16**
**Particular customary international law**

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.

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# Protection of the Atmosphere

## Texts and titles of draft guidelines and preamble adopted by the Drafting Committee on first reading

### Preamble

*Acknowledging* that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

*Bearing in mind* that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

*Noting* the close interaction between the atmosphere and the oceans,

*Recognizing* therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

*Aware* of the special situation and needs of developing countries,

*Aware also*, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

*Noting* that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

*Recalling* that the present draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

### Guideline 1
### Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

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(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

**Guideline 2**
**Scope of the guidelines**

1. The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

**Guideline 3**
**Obligation to protect the atmosphere**

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

**Guideline 4**
**Environmental impact assessment**

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

**Guideline 5**
**Sustainable utilization of the atmosphere**

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

**Guideline 6**
**Equitable and reasonable utilization of the atmosphere**

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

**Guideline 7**
**Intentional large-scale modification of the atmosphere**

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

**Guideline 8 [5][1]**
**International cooperation**

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

[1] The draft guideline was renumbered during the sixty-eighth session of the Commission. The original number appears in square brackets.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

**Guideline 9**
**Interrelationship among relevant rules**

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including, *inter alia*, the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

**Guideline 10**
**Implementation**

1. National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions.

2. States should endeavour to give effect to the recommendations contained in the present draft guidelines.

**Guideline 11**
**Compliance**

1. States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties.

2. To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:

(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;

(b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures.

**Guideline 12**
**Dispute settlement**

1. Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means.

2. Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts.

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# Provisional application of treaties

## Texts and titles of the draft guidelines adopted by the Drafting Committee on first reading

## Guide to Provisional Application of Treaties

**Draft guideline 1**
***Scope***

The present draft guidelines concern the provisional application of treaties.

**Draft guideline 2**
***Purpose***

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

**Draft guideline 3**
***General rule***

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

**Draft guideline 4**
***Form of agreement***

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

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**Draft guideline 5 [6]**
***Commencement of provisional application***

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

**Draft guideline 6 [7]**
***Legal effect of provisional application***

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

**Draft guideline 7 [5 *bis*]**
***Reservations***

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

**Draft guideline 8**
***Responsibility for breach***

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

**Draft guideline 9**
***Termination and suspension of provisional application***

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

**Draft guideline 10**
***Internal law of States and rules of international organizations, and the observance of provisionally applied treaties***

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

**Draft guideline 11**

***Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties***

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

**Draft guideline 12**

***Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations***

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.